MOTION FILED

SEP 5 2000

(2)

No. 00-0186

In The
Supreme Court of the United States

TOPPS COMPANY, INC.

Petitioner,

v.

REVENUE DIVISION OF THE DEPARTMENT OF TREASURY OF THE STATE OF MICHIGAN,

Respondent.

On Petition For A Writ Of Certiorari To The Court of Appeals of the State of Michigan

BRIEF OF *AMICUS CURIAE*, THE GILLETTE COMPANY, IN SUPPORT OF PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

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MOTION TO APPEAR AS *AMICUS CURIAE*

NOW COMES The Gillette Company ("Gillette") and, pursuant to Supreme Court Rule 37.2(b), moves this Honorable Supreme Court to allow Gillette to appear as *Amicus Curiae* in this cause and to file with this Court its Brief of *Amicus Curiae* The Gillette Company in Support of Petitioner's Petition for Writ of Certiorari to the Court of Appeals of the State of Michigan. In support of its Motion, Gillette states as follows:

1. On August 22, 2000, and pursuant to Supreme Court Rule 37.2(a), Petitioner, The Topps Company ("Topps"), granted Gillette consent to appear as *amicus curiae* in this cause.

2. On August 24, 2000, and pursuant to Supreme Court Rule 37.2(a), counsel for Gillette contacted counsel for Respondent, the Michigan Department of Treasury ("the Department"), to seek the Department's consent to Gillette appearing as *amicus curiae* in this cause. The Department declined to grant consent, stating that it did not believe that this cause is important enough to warrant a brief in opposition to the Petition for Writ of Certiorari and, therefore, would not consent to Gillette's request to appear as *amicus curiae*. Therefore, Gillette submits this Motion and Brief in accordance with Supreme Court Rule 37.2(b).

3. From 1980 to 1993, the Department issued Bulletins declaring Public Law 82-272, codified as 15 U.S.C. §381 ("PL 86-272"), as Michigan's single business tax ("SBT") nexus/jurisdictional test. PL 86-272 is federal legislation that prohibits a state from taxing an out-of-state business if the only activities in state are the "solicitation of orders". The Department also issued Bulletins informing taxpayers that the Department would be bound by its Bulletins declaring PL 86-272 as the jurisdictional test and, therefore, taxpayers could rely on such Bulletins in organizing and conducting their business activities in Michigan. Gillette relied on the Department's Bulletins and organized and restricted its business activities in

Michigan to avoid liability under Michigan's Single Business Tax Act, Mich. Comp. Laws § 208.1 et seq. ("SBTA").

4. Gillette was the first taxpayer to challenge the Department's assertion of SBT liability against it under PL 86-272. Gillette engaged in extensive litigation with the Department concerning whether Gillette's activities in Michigan, during the tax years 1976 to 1981, exceeded the protection of PL 86-272.

5. In 1993, and long after Gillette engaged in conduct that the State assured would not give rise to SBT liability, the Department retroactively abandoned and rescinded its previously issued Bulletins declaring PL 86-272 as the jurisdictional standard. The Department instead applied the much broader due process and commerce clause nexus standards enunciated in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) ("the DP/CC test"), and held applicable to Michigan's SBT by the Michigan Court of Appeals' *sua sponte* decision in *The Gillette Comp. v Michigan Dept. of Treasury*, 497 N.W.2d 595 (Mich. Ct. App. 1993), *lv. den.* 519 N.W.2d 156 (1994), *cert. den.* 130 L.Ed.2d 673 (1995).

6. Gillette is the first "victim" of the State's retroactive imposition of SBT liability under the DP/CC test, and has been subjected to the severest penalties imposed by the Department – retroactive collection of SBT taxes back to 1976.

7. The effect of the Department's retroactive application of the DP/CC test is to subject Gillette, Topps, and many other out-of-state businesses, to significant SBT liability and penalties for years in which the Department assured such taxpayers that no SBT liability would be imposed. The Department has effectively imposed punishment for past conduct that was lawful when it took place.

8. Gillette, like Topps and many other out-of-state businesses, is adversely affected by Michigan's retroactive

application of a new and unanticipated single business tax jurisdictional standard to those out-of-state businesses who relied on the Department's previously published jurisdictional standard. Gillette, Topps, and all other out-of-state businesses, are without a "political voice" in Michigan. The Michigan Courts have been unwilling to protect their constitutional right to due process; they must therefore rely on this Court to do so.

9. The Court of Appeals Opinion (which Topps requests this Court to issue a writ of certiorari to review), if permitted to stand, will send a signal to state agencies that they are in effect immune from the limitations imposed by the Due Process Clause of the Fourteenth Amendment of the United States Constitution, U.S. Const. Amend. XIV, §1. The Opinion of the Michigan Court of Appeals, if permitted to stand, will permit state agencies to renege on binding promises long after taxpayers had relied on such promises and had engaged in conduct they were assured was lawful when it took place.

WHEREFORE, Gillette respectfully requests that this Court grant its Motion to appear as *Amicus Curiae* and allow it to file the attached Brief of *Amicus Curiae*, the Gillette Company in Support of Petitioner's Petition for Writ of Certiorari to the Court of Appeals of the State of Michigan.

Respectfully submitted,

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61 Texas L. Rev. 425 (1982) 16

Interest of *Amicus Curiae* The Gillette Company

This brief is submitted by The Gillette Company ("Gillette") as *amicus curiae* in support of the Petition for Writ of Certiorari to the Court of Appeals of the State of Michigan filed by Petitioner, The Topps Company, Inc.[1] Gillette, as well as hundreds of other out-of-state businesses, are adversely affected by Michigan's retroactive rescission and abandonment of its administratively adopted Single Business Tax Jurisdictional standard that was in effect for more than thirteen years.

From 1980 to 1993, the Michigan Department of Treasury ("the Department") declared to the world in published Bulletins that it would use Public Law 86-272, codified as 15 U.S.C. §381, as the administratively adopted jurisdictional test under the Michigan Single Business Tax Act, Mich. Comp. Laws. §208.1 et seq. ("SBTA").[2] Gillette relied upon the Department's published Bulletins and organized and restricted its business activities in Michigan so as to avoid liability under the SBTA.[3] In 1993, the Department reversed course and abandoned PL 86-272 as the jurisdictional standard to be applied to the SBTA and retroactively applied the due

[1] Counsel for Gillette authored this *amicus curiae* brief in whole, and no other entity, other than Gillette, made a monetary contribution to the preparation and filing of this brief.

[2] PL 86-272 prohibits a state from imposing a net income tax on the income derived from interstate commerce if the person's only business activities within the state are the solicitation of orders for sales of tangible personal property sent outside the state for approval or rejection and filled by shipment or delivery from a point outside the state. (See App. 18-19 to Petitioner's Petition for Writ of Certiorari.)

[3] The Department issued Single Business Tax Bulletin 1980-1 (May, 1980), entitled *Single Business Tax Jurisdictional Standard* (App. 38-42 to Petitioner's Petition for Writ of Certiorari), and Revenue Administrative Bulletin 1989-46 (approved: May 31, 1989), entitled *Single Business Tax Jurisdictional Standard* ("RAB 89-46") (App 43-50 to Petitioner's Petition for Writ of Certiorari), to notify persons engaged in business that it had administratively adopted PL 86-272 as the jurisdictional standard for determining taxability under the SBTA.

process/commerce clause test ("DP/CC test") enunciated in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). The DP/CC test is much easier to meet than the PL 86-272 test. Under the DP/CC test, a multi-state business with a Michigan resident employee would be subject to Michigan's single business tax ("SBT") jurisdiction.[4] The Department's retroactive abandonment and rescission of PL 86-272 resulted in SBT liability for hundreds of out-of-state businesses, including Gillette and Topps, for past years during which the Department had assured such businesses that they would not be liable for SBT taxes if they confined their business activities in Michigan to those protected by PL 86-272. The State of Michigan, through its Department of Treasury, effectively declared past lawful conduct to be "unlawful" and subject to severe penalties. The State of Michigan has eviscerated the fundamental principle that "the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place." *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring.)

The retroactive rescission of PL 86-272 as the SBTA jurisdictional test further penalized Topps, Gillette, and other out-of-state businesses by subjecting Topps, Gillette, and others, to multiple taxation. Under the SBTA (and the Uniform Division of Income for Tax Purposes Act ("UDITPA") 7A U.L.A. 356 (1999), a taxpayer whose business activities are taxable both within and without the State, is required to apportion its tax base.[5] In reliance on the Department's Bulletins declaring PL 86-272 as the SBT jurisdictional test, Gillette reasonably believed it was not taxable in Michigan and apportioned 100% of its income to its home state.[6] The Department's retroactive rescission of PL 86-272, and the

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[4] See *Wisconsin Department of Revenue v. Wrigley, Co.*, 505 U.S. 214 (1992), for the type of "immune activities" protected from state taxation under PL 86-272.

[5] See App. 28-34, 36-37 to Topps' Petition for Writ of Certiorari.

[6] See Mich. Comp. Laws, §§ 208.41, 208.42, 208.45 (See App. 28-31 and App. 36-37 to Topps' Petition for Writ of Certiorari.)

retroactive application of the DP/CC test as the SBT jurisdictional test, subjects Gillette to multiple taxation. Further, the period of limitations to seek refunds or credits for SBT taxes paid has long expired.

SUMMARY OF ARGUMENT

I. HISTORY BEHIND MICHIGAN'S ADOPTION OF PL 86-272 AS ITS JURISDICTIONAL STANDARD AND THE DEPARTMENT'S RETROACTIVE RESCISSION OF THIS STANDARD.

Michigan enacted its Single Business Tax ("SBT") effective January 1, 1976. Mich. Comp. Laws §§ 208.1 et seq. The SBT, a modified value added tax[7], replaced Michigan's corporate income tax. In 1973, when Michigan's corporate income tax was in effect, Gillette determined that it would restrict its activities in Michigan to those permissible as sales solicitation under PL 86-272. The Department audited Gillette for the years 1974 and 1975, and concluded that PL 86-272 precluded the imposition of the Michigan corporate income tax. In 1976, Michigan enacted the SBTA, Mich. Comp. Laws § 208.1 et seq. As part of the same audit of Gillette's 1974 and 1975 corporate income taxes, the Department also audited Gillette for 1976 under the SBTA. The Department concluded that PL 86-272 was applicable only to income taxes, and since the SBT was not an income tax, it determined PL 86-272 did not apply to the SBTA and issued a SBT deficiency assessment against Gillette for the year 1976. SBT tax years 1977 through 1981 were later added to Gillette's SBT deficiency assessments.

Gillette protested the Department's SBT assessments for years 1976 through 1981. During the exhaustion of Gillette's administrative remedies, and before the SBT assessments were finalized, the Department concluded that it would, as a matter of administrative policy, apply PL 86-272 as

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[7] *Trinova Corp. v. Michigan Dep't. of Treasury*, 498 U.S. 358 (1991).

the jurisdictional test under the SBTA. This determination was confirmed by the Department in 1980 in its published Single Business Tax Bulletin 1980-1 (App. 38-42 to Petitioner's Petition for Writ of Certiorari), and subsequently reconfirmed in 1989 by the Department in its published Revenue Administrative Bulletin ("RAB") 89-46, entitled "Single Business Tax – Jurisdictional Standard." App. 43-50 to Petitioner's Petition for Writ of Certiorari.[8] The Department nevertheless finalized and issued the 1976 to 1981 SBT assessments against Gillette, asserting that Gillette's activities exceeded that "solicitation" permitted by PL 86-272.

Gillette proceeded to trial in the Michigan Tax Tribunal, challenging the Department's assertion of SBT jurisdiction for years 1976-1981 under PL 86-272, the only jurisdictional standard the Department declared was applicable in Michigan. During the litigation, Gillette verified, and re-verified, that the Department had uniformly applied PL 86-272 as the SBTA jurisdictional test, and that such jurisdictional test was the only jurisdictional test the State applied and would assert in the Gillette litigation.[9]

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[8] In 1989, the Department also issued RAB 89-34, App. 51-55 to Petitioner's Petition for Writ of Certiorari, assuring taxpayers that the jurisdictional standard announced in its Bulletins could be relied on and were binding on the Department. The Department, in its Bulletins, effectively assured taxpayers that there would be no retroactive change in its position, and that taxpayers could rely on the assurances published by the Department in organizing and conducting its business activities in Michigan so as to avoid SBT liability.

[9] On February 13, 1989, the Tax Tribunal concluded that Gillette's activities exceeded that solicitation permitted by PL 86-272, and affirmed the assessments for years 1976 to 1981. *The Gillette Company v. Dep't of Treasury*, Nos. 73916, 90676-7 Mich. St. Tax Rep. (CCH) 201-246 (Mich. Tax Trib. February 13, 1989).

A. Enter the Michigan Court of Appeals.

On June 23, 1989, Gillette appealed to the Michigan Court of Appeals the decision of the Michigan Tax Tribunal.[10] Both the Department and Gillette devoted their appellate briefs to whether Gillette's activities exceeded PL 86-272. PL 86-272 was the only jurisdictional test the parties briefed and argued. The Court of Appeals panel focused all of their questioning at oral arguments on whether Gillette's activities were protected by PL 86-272.[11]

On March 1, 1993, the Michigan Court of Appeals issued its Opinion in *Gillette*, holding *sua sponte*, that PL 86-272 was not the appropriate jurisdictional test to be applied to the SBT, and adopted instead the DP/CC test enunciated in *Quill*. The Court of Appeals, believing the parties had "overlooked" the issue, stated, "Although not raised as an issue by the parties, we must determine whether PL 86-272 applies in the instant case." 497 N.W.2d at 597. The Court of Appeals concluded that, because the SBT is not an income tax, or a tax measured by income, PL 86-272 did not apply. 497 N.W.2d at 598-99. The Court of Appeals affirmed the SBT assessments against Gillette for years 1976-1981 under the DP/CC test.

The Court of Appeals simply misunderstood the facts and the case before it. It had been established for many years that the SBT was not a tax imposed on or measured by net income, and therefore, PL 86-272 by its literal terms, would not

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[10] The Court of Appeals opinion is reported at *The Gillette Comp. v. Dep't of Treasury*, 497 N.W.2d 595 (Mich. Ct. App. 1993), *lv den* 445 Mich. 861 (1994), *cert. den.* 513 U.S. 1103 (1995).

[11] After oral arguments, but before the Court of Appeals issued its decision, this Supreme Court issued its decision in *Wisconsin Dep't of Revenue v. Wrigley Co.*, 505 U.S. 214 (1992). The *Wrigley* decision involved the first construction of the "solicitation of orders" language in PL 86-272. Gillette filed a supplemental brief with the Court of Appeals, bringing the *Wrigley* decision to its attention.

apply.[12] The Michigan appellate courts had also recognized this fact nearly ten years before the *Gillette* decision.[13]

B. The Department of Treasury – Well Aware that the SBT Is Not An Income Tax – Nevertheless Administratively Adopted and Uniformly Applied PL 86-272 As The SBTA Jurisdictional Standard.

In 1980, and again in 1989, the Department declared to the world through its published Bulletins that it would apply PL 86-272 as its SBTA jurisdictional test. The Michigan Legislature, for more than 17 years, acquiesced in the PL 86-272 standard.[14] In 1993, the Department reversed course and retroactively abandoned and rescinded PL 86-272 as the jurisdictional standard and retroactively imposed the DP/CC test to 1989.[15] The effect of the Department's retroactive imposition of a new SBT jurisdictional test is to subject out-of-state businesses to SBT liability and penalties for years during which the Department assured such taxpayers no SBT liability would be asserted.

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[12] *See, e.g.*, Opper, *Constitutional Aspects of the Single Business Tax Act*, 22 Wayne L. Review 1167, 1167-1171 (1976), quoting from the Department's *Single Business Tax Questions and Answers* (June 5, 1976), "We conclude that the SBT is not an income tax or measured by net income, that [15 USC §381 (1976)] will not be used to determine nexus.

[13] *See, Trinova Corp. v. Dept. of Treasury*, 445 N.W.2d 428 (Mich. 1989), *aff'd* 498 U.S. 358 (1991), *Mobil Oil Corp. v. Dept. of Treasury*, 373 N.W.2d 730 (Mich. 1984); *Town & Country Dodge, Inc. v. Dept. of Treasury*, 394 N.W.2d 472 (Mich. App. 1986), *Wismer & Becker Contracting Engineers v. Dept. of Treasury*, 382 N.W.2d 505 (Mich. App. 1985).

[14] The Single Business Tax was amended over 45 times during the 1976-1993 interim, yet not once did the Legislature in the course of its "revision of tax laws to distribute increased costs of government among its taxpayers in the light of present need for revenue," suggest a different jurisdictional test to be applied. (See *Welch v. Henry*, 305 U.S. 134, 149 (1938).)

[15] *See infra* note 17.

ARGUMENT

II. THE DEPARTMENT'S RETROACTIVE APPLICATION OF THE DP/CC JURISDICTIONAL TEST UNCONSTITUTIONALLY DEPRIVES TOPPS, GILLETTE, AND OTHER TAXPAYERS THAT RELIED ON THE DEPARTMENT'S PUBLISHED BULLETINS DECLARING PL 86-272 AS THE JURISDICTIONAL TEST, THEIR DUE PROCESS RIGHTS

A. The Department's Administrative Actions Following the Court Of Appeals' Decision In *Gillette*

The Court of Appeals' *Gillette* decision *sua sponte* held the PL 86-272 jurisdictional test administratively adopted and uniformly applied by the Department for more than 17 years[16] inapplicable, and held the much broader and easier-met DP/CC test applicable to Gillette for the tax years there at issue, 1976 through 1981. Following the *Gillette* decision, the Department, without legislative authority, retroactively abandoned and rescinded its prior Bulletins declaring PL 86-272 as the applicable jurisdictional test and applied the DP/CC test

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[16] The Department applied PL 86-272 as the SBT jurisdictional standard from 1976 until 1993 when the *Gillette* decision was issued.

retroactively to 1989 for hundreds of out-of-state businesses.[17] The retroactive application of the DP/CC test subjects Topps, Gillette, and other taxpayers, to retroactive SBT liability for years pre-dating the 1993 *Gillette* decision.

The Michigan Commissioner of Revenue and the Department of Treasury derive their authority to administer the SBTA solely from the Department of Revenue Act, MICH COMP. LAWS § 205.1 (the "Revenue Act"). Section 3(f) of the Revenue Act, MICH. COMP. LAWS. § 205.3(f), authorizes the Department to issue bulletins "that index and explain current department interpretations of current state tax laws." (App. 22-25 to Petitioner's Petition for Writ of Certiorari). The Michigan Administrative Procedures Act ("MAPA"), MICH. COMP. LAWS.

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[17] For hundreds of out-of-state businesses that the Department located and identified following the *Gillette* decision, the Department applied the new DP/CC test retroactively to 1989. Yet for a handful of other out-of-state businesses, including *Amicus* Gillette, the Department has assessed and has attempted to collect SBT taxes back to 1976. The other taxpayers that were subject to SBT taxes for years prior to 1989, of which *Amicus* Gillette is aware, include Syntex Laboratories (see *Syntex Laboratories, Inc. v Dept of Treasury*, 590 N.W. 2d 612 (Mich. Ct. App. 1998), *lv. den.* 607 N.W. 2d 726 (Mich. 2000), and *Cosmair, Inc.* (see *Cosmair, Inc. v. Dep't of Treasury*, No. 198240 (Mich. Ct. App. 1998), *cert. den.* 145 L.Ed.2d 934 (2000).)(App. 1a - 4a and App. 5a.) Yet further, and for the substantial majority of the thousands of taxpayers the Department located after the *Gillette* decision, the Department has prospectively applied the DP/CC test for years beginning in 1993. The Department, for the benefit of the majority of out-of-state businesses that had relied on PL 86-272 as Michigan's SBTA jurisdictional standard, sought and obtained a legislative "fix" to the problems wrought by the Court of Appeals *sua sponte* decision in *Gillette*. Under this new legislation, MICH. COMP. LAWS § 205.30c (App. 6a - 10a), thousands of taxpayers that did not comply with the Department's demand in 1993 to file SBT returns and remit SBT taxes retroactively for years starting in 1989 under the new DP/CC test, are now permitted to do so starting with the 1993 tax year, the year the *Gillette* decision was issued, with prior years SBT liability forgiven.

§ 24.201, *et seq.*, establishes that guidelines of administrative agencies, like the Department of Treasury Bulletins, are binding on the agency that promulgates them. MICH. COMP. LAWS. § 24.203(6) (1979) (App. 20-21 to Petitioner's Petition for Writ of Certiorari). In 1989, in Revenue Administrative Bulletin 1989-34, the Department assured taxpayers that its Bulletins were binding on the Department, had the status of precedent, and could be relied upon by taxpayers. (App. 51-55 to Petitioner's Petition for Writ of Certiorari.) Nowhere in the Revenue Act or the MAPA is the Department given statutory authority to retroactively abandon or rescind its Bulletins.

B. This Case Cannot be Disposed of by Concluding that the Court of Appeals in its *Gillette* Decision Invalidated PL 86-272 as the Jurisdictional Standard.

The Court of Appeals in this case erroneously held,

> Defendant [the Department] did not change its position regarding plaintiff's [Topp's] immunity from taxation under the SBTA, but rather was required by this Court to change its policy... [I]n this case, defendant changed its position only *after it was forced to do so* by an order of this Court. *Gillette*, *supra*, 198 Mich. App. 311.

(App. 10 to Petitioner's Petition for Writ of Certiorari). The Court of Appeals was wrong. The *Gillette* decision did not "force" the Department to retroactively change its administratively adopted PL 86-272 jurisdictional test. The Department, by administrative action, and without specific statutory authority, retroactively changed the jurisdictional test. Following the *Gillette* decision, the Department could have, and should have, prospectively applied the new DP/CC jurisdictional test uniformly to all taxpayers who relied on the

Department's previously issued and published Bulletins declaring PL 86-272 as the jurisdictional test. This the Department has admitted it could have done,[18] this is what Michigan case law clearly permits could have been done (see *MCI Telecommunications Corp. v. Dep't. of Treasury*, 355 N.W.2d 627, 632 (Mich. Ct. App. 1984) (Department of Treasury could adopt post-appellate decision policies [i.e., prospective application] of either taxing or not taxing similarly situated taxpayers). And, more importantly, this is what the Due Process Clause of the U.S. Constitution (U.S. Const., amend. XIV, §1) demands should have been done.

The rule of law is premised on a concept of reliance. See, *Lemon, et al. v. Kurtzman, et al.*, 411 U.S. 192, 198-99 (1973). See also, *Clark-Cowlitz Joint Operating Agency v FERC, et al.*, 826 F. 2d 1074, 1100 (D.C. Cir. (1987)) (Mikva, J., dissent). The State of Michigan, through its Department of Treasury, assured taxpayers that they could rely on its published Bulletins and that its Bulletins would not retroactively change. Out-of-state businesses relied on the Department's Bulletins and restricted their activities in Michigan in conformity with PL 86-272 so as to avoid SBT liability. The State breached its promise long after taxpayers organized and conducted their Michigan business activities in reliance upon the State's promise. The Court of Appeals decision in *Topps* glossed over the Department's broken promises and the damage caused thereby by offering the excuse that the Department simply did what the Court of Appeals decision in *Gillette* required it to do. The Court of Appeals decision in this case turns the "concept of reliance" on its head and marks a stark departure from the "rule of law."

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[18] In *Syntex Laboratories, Inc. v. Dep't of Treasury*, 590 N.W. 2d 612 (Mich. Ct. App. 1998), *lv. den.* 607 N.W. 2d 726 (Mich. 2000), in the Department's Brief in Opposition to Syntex's Application for Leave to Appeal to the Michigan Supreme Court, the Department stated, "First, the Department could have actively attempted to obtain compliance by all taxpayers with *Gillette* for tax years beginning in or after 1993 (the year *Gillette* and *Guardian* were decided). This would have been a viable alternative. (App. 11a - 17a.)

As was appropriately explained by the dissenting opinion of Justice Black, with whom Justices Whittaker and Stewart concurred, in *St. Regis Paper Co. v. U.S.*, 368 U.S. 208, 229 (1961), "[O]ur government should not permit one of its arms [the Court of Appeals] to do that which, ... the Government [the Michigan Department of Treasury] has promised no arm will do." The Court stated:

> "Quite plainly, the promised protection was against governmental 'taxation, investigation or regulation' generally, and, to protect the integrity of that promise, it is of course necessary that all of the particular arms of Government which are engaged in those activities be bound by the Government's pledges. **Our Government should not, by picayunish haggling over the scope of its promises, permit one of its arms to do that which, by any fair construction, the Government has given its word that no arm will do.** It is no less good morals and good law that the Government should turn square corners in dealing with the people than that the people should turn square corners in dealing with their Government. *Cf. Rock Island, Arkansas & Louisiana R. Co. v. United States*, 254 U.S. 141, 143."

(Emphasis added).

This fundamental concept of trust in Government was later reiterated and emphasized by this Court in *Heckler v. Community Health Services of Crawford County, Inc., et al.*, 467 U.S. 51, n.13 (1984), where the Court stated:

> "See generally *St. Regis Paper Co. v. United States*, 368 U.S. 208, 209 (1961) (Black, J., dissenting) ("Our Government should not, by picayunish

> haggling over the scope of its promises, permit one of its arms to do that which, by any fair construction, the Government has given its word that no arm will do. It is no less good morals and good law that the Government should turn square corners in dealing with the people than that the people should turn square corners in dealing with their Government."); *Federal Crop Insurance Corp. v. Merrill*, 332 U.S., at 387-388 (Jackson, J., dissenting) ("It is very well to say that those who deal with the Government should turn square corners. But there is no reason why the square corners should constitute a one-way street"); *Brandt v Hickel*, 427 F.2d 53, 57 (CA 9 1970) (**"To say to these appellants, 'The joke is on you. You shouldn't have trusted us,' is hardly worthy of our great government"**); *Menges v. Dentler*, 33 Pa 495, 500 (1859) (**"Men naturally trust in their government, and ought to do so, and they ought not to suffer for it"**). See also *Giglio v. United States*, 405 U.S. 150, 154-155 (1972).

(Emphasis added.) This fundamental principle that those who justifiably rely on promises made by their Government can do so safely, reflects the strong belief of the Framers of the Constitution:

> [M]en should not have to act at their peril, fearing always that the State might change its mind and alter the legal consequences of their past acts so as to take away their lives, their liberty or their property. James Madison explained that the people were 'weary of the fluctuating policy' of state legislatures and wanted it made clear that under the new Government men could safely rely on States to keep faith with those who justifiably relied on

> their promises. *The Federalist, No. 44, at 301* (Cooke ed. 1961).

See, *City of El Paso v. Simmons,* 379 U.S. 497, 522 (1965) (Black, dissent). See also, *Landgraf v. USI Film Products, et al.,* 511 U.S. 244, 267 (1994).

Taxpayers, such as Topps and Gillette, were reasonably justified in relying on the Department's published Bulletins. After all, the State gave them written assurances that they could, and should, so rely. The Court of Appeals in this case has effectively held that persons should not, and cannot, rely on assurances made by their Government, for if they do, they proceed at their own peril. This is not good government; and this is certainly not due process of law.

C. The Guarantee of Due Process of Law Requires Uniform Prospective Application of the New DP/CC Jurisdictional Test Announced in *Gillette.*

It is important for this Court to note that the State's retroactive rescission of its previously issued Bulletins, and its retroactive imposition of the DP/CC test, was not done by way of legislative authorization. The Department, by administrative policy, effected a significant retroactive change in an out-of-state businesses' SBT liability for past years during which the Department assured such taxpayers that their SBT liability would be assessed under PL 86-272, in accordance with the Department's published Bulletins. Out-of-state businesses justifiably relied on the Department's published Bulletins and organized and conducted their business activities in Michigan so as to avoid SBT liability. Due Process requires that the pre-1993 SBT liability of these taxpayers be determined in conformity to the PL 86-272 jurisdictional test then in effect. See *Helvering v. R.J. Reynolds Tobacco Co.*, 306 U.S. 110, 116 (1939), "We hold that the respondent's tax liability for the year 1929 is to be determined in conformity to the [administrative] regulation then

in force... Since the legislative approval of existing regulations by reenactment of the statutory provision to which they appertain gives such regulations the force of law, we think that Congress did not intend to authorize the Treasury to repeal the rule of law that existed during the period for which the tax is imposed."

The SBTA was amended over 45 times during the 1976-1993 period during which the Department uniformly applied PL 86-272 as the SBTA jurisdictional standard. Yet not once during that interim did the Legislature suggest a different jurisdictional test be applied. The Department's more than 17-year uniform application of PL 86-272 as the SBTA jurisdictional test, and the Legislature's implicit approval of that jurisdictional test during the 1976-1993 interim, gave the Department's Bulletins the "force of law ..."[19]

The Court of Appeals likened the actions of the Department to retroactive tax legislation and concluded that there was no due process violation as a result of the Department's retroactive imposition of the DP/CC jurisdictional test. (App. 11-13 to Petitioner's Petition for Writ of Certiorari.) The Court of Appeals' comparison overlooks a critical point and well-established legal principals.

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[19] See, *Nashville C. & S.L.R. Co. v. Browning*, 310 U.S. 362, 369-370 (1940), where the Court stated:

> "It would be a narrow conception of justice to confine the notion of 'laws' to what is found written on the statute books, and to disregard the laws which life has written upon it. *Settled state practice* cannot supplant constitutional guarantees, but it *can establish what is state law ... deeply imbedded traditional ways of carrying out state policy*, such as those of which petitioner claims, are often tougher and truer law than the dead words of the written text."

The Department's published Bulletins declaring PL 86-272 as the SBTA jurisdictional test, and the State's uniform application of that test for more than 17 years, "establishes what is state law."

This Court has repeatedly emphasized that "retroactive legislation has always been looked upon with disfavor." *Bowen v. Georgetown University Hospital, et al.,* 488 U.S. 204, 223 (1988) (Scalia, J., concurring), citing, Smead, The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence, *20 Minn. L. Rev. 775 (1936)*; 2 J. Story, Commentaries on the Constitution of the United States §1398, p. 272 (5th ed. 1891). See, *Landgraf,* 511 U.S. at 264, 265; *Kaiser Aluminum & Chemical Corp. v. Bonjorno,* 494 U.S. 827, 842-844, 855-56 (1990) (Scalia, J., concurring). This presumption against retroactive legislation "is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf,* 511 U.S. at 265. As the Court recognized in *Landgraf, supra,* "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted."[20] For that reason, the "***principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.***" (Emphasis added) *Kaiser,* 494 U.S. at 855 (Scalia, J., concurring).

Given the traditional attitude towards retroactive legislation, it is entirely unsurprising, therefore, that state legislators and Congress have been unwilling to confer such power upon governmental administrative agencies. See, *Bowen v. Georgetown University Hospital,* 488 U.S. at 208, 223-24; *Helvering v. R.J. Reynolds,* 306 U.S. at 115-116. And, where an administrative agency lacks express statutory authority to engage in retroactive rule or policy making, the Courts have struck down agencies

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[20] Citing, *General Motors Corp. v. Romein,* 503 U.S. 181, 191 (1992) ("Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions."), and Munzer, *A Theory of Retroactive Legislation,* 61 Texas L. Rev. 425, 471 (1982) ("The rule of law . . . is a defeasible entitlement of persons to have their behavior governed by rules publicly fixed in advance.")

attempts to do so. In *Helvering, supra,* the Court, while sustaining the power of the Treasury Department to change its interpretative regulations so as to operate prospectively, denied it the power to apply a new or amended regulation retroactively. See, *Bowen, supra; Heckler v. Community Mental Health Services,* 467 U.S. at 61, n.12 (1984).

The Michigan Legislature did not authorize, or intend to authorize, the Department's retroactive repeal of its Bulletins declaring PL-86-272 as the jurisdictional test during the period for which that jurisdictional test was imposed and relied upon by taxpayers. Nowhere in the Revenue Act or the Michigan Administrative Procedures Act is the Department authorized to engage in retroactive rule or policy changes. In fact, just the opposite is true. The administrative bulletins that the Department is statutorily authorized to issue states that they have, "the status of precedent in the disposition of cases unless and until revoked or modified, and may be relied upon by taxpayers in situations where the facts, circumstances and issues presented are substantially similar to those set forth within the Bulletin." App. 51-52 to Petitioner's Petition for Writ of Certiorari.

The Court of Appeals decision in this case contradicts the well-established principle that the Michigan Department of Treasury cannot change its Bulletins retroactively. The Due Process Clause of the United States Constitution requires that the Department uniformly apply the new DP/CC SBT jurisdictional test prospectively only.

CONCLUSION

Amicus Curiae, The Gillette Company, supports Topps' Petition for Writ of Certiorari to the Michigan Court of Appeals and prays that this Honorable Supreme Court grant the Petition.

Respectfully submitted,

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DELIB:2179762.1\033519-00003

STATE OF MICHIGAN
COURT OF APPEALS

COSMAIR, INC.,

Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,

Defendant-Appellee

UNPUBLISHED
March 20, 1998

No. 198240
Court of Claims

Before: McDonald, P.J., and Sawyer and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order of the Court of Claims denying plaintiff's motion for summary disposition and granting defendant's cross-motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

Prior to 1993, the parties believed that PL 80-272, which is codified at 15 USC 381, protected businesses that merely solicited orders in Michigan from being subject to the single business tax under MCL 208.1 *et seq.;* MSA 7.558(1) *et seq.* After closing its Michigan facility in 1983, Plaintiff opined that it was no longer subject to the single business tax, although it nevertheless paid the tax for 1984-88. Defendant, which denied plaintiff's subsequent requests for refunds, disagreed with plaintiff's interpretation of PL 86-272 and twice advised plaintiff that its activities were sufficient to establish defendant's jurisdiction to assess the single business tax. Plaintiff requested that defendant postpone its hearing and final tax assessment until this Court issued its decision in *Gillette Co v Dep 't of Treasury,* 198 Mich App 303; 497 NW2d 595 (1993).

In *Gillette, supra* at 311, this Court found that PL 86-272 was inapplicable to the imposition of the single business tax and

that such taxation would instead depend upon an analysis under the process and commerce clauses ("the DP/CC test"). Ultimately, this Court held that the DP/CC test did not prevent the retroactive imposition of the single business tax against Gillette for tax years 1976-81. *Id.* at 311-314. Defendant subsequently notified nonfiling potential taxpayers who were no longer protected by PL 86-272 that they were subject to defendant's jurisdiction according to the decision in *Gillette;* however, the notice also stated that recipients of the notice would be permitted to voluntarily pay the single business tax for the years 1989-93, with interest but without penalty. Defendant did not send the notice to plaintiff and refused to extend the same option to plaintiff when plaintiff requested it. Plaintiff argues that defendant's retroactive application to plaintiff of the DP/CC test for tax years 1984-88 is a violation of plaintiff's constitutional rights to equal protection and uniform taxation because it is not being treated the same as the nonfiling potential taxpayers, to whom defendant did not apply the test beyond 1989.[1]

We review de novo the decision of the Court of Claims to grant defendant summary disposition. *Gainey Transportation*

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[1] In a related argument, plaintiff asserts that defendant's disparate treatment is also attributable to defendant's "re-adoption" of the test enunciated in PL 86-272, despite this Court's holding in *Gillette, supra.* Specifically, plaintiff argues that defendant used plaintiff's alleged liability under 86-272 to distinguish between plaintiff and the group of non-filing potential taxpayers, which had not been liable for the single business tax under PL 86-272. According to plaintiff, this would an unlawful distinction to draw and would require reversal, much like reversal was required in *Armco, supra,* where the department used an improper means of distinguishing between two groups of taxpayers. However, even assuming that we were willing to engage in the now futile analysis of whether plaintiff is liable under PL 86-272, a resolution of this argument in plaintiff's favor would not alter our holding in this case. Our holding depends on various other factors establishing that plaintiff was not similarly situated to the group receiving defendant's notice and establishing that defendant's disparate treatment had a rational basis. Indeed, it is not the topic or outcome of plaintiff's litigation with defendant that set plaintiff apart from the others but the very fact that the parties were engaged in litigation and therefore were previously known to one another.

Service, Inc v Dep't of Treasury, 209 Mich App 504, 506; 531 NW2d 774 (1995). Although the Court of Claims apparently misconstrued some of plaintiff's arguments, we nonetheless affirm its decision to grant defendant summary disposition as the right result in this case. *General Aviation, Inc v Capital Regional Airport Authority (On Remand)*, 224 Mich App 710, 716; 569 NW2d 883 (1997). We hold that plaintiff's rights were not violated because it was not similarly situated to the class of taxpayers receiving the notice and because there was a rational basis for defendant's disparate treatment.

Equal protection of the law is guaranteed by both the federal and Michigan constitutions. US Const Am XIV; Const 1963, art 1, § 2. The Michigan Constitution also guarantees uniformity of taxation. Const 1963, art 9, § 3. These constitutional rights require that similarly situated taxpayers be treated equally and that any disparate treatment have a rational basis. *Armco Steel Corp v Dep't of Treasury,* 419 Mich 582, 592; 358 NW2d 839 (1984). A rational basis for disparate treatment exists when a set of facts can be reasonably conceived to justify the alleged discrimination and disparate treatment is not invalid merely because it results in some inequity. *St Louis v Michigan Underground Storage Tank Financial Assurance Policy Bd,* 215 Mich App 69, 73; 544 NW2d 705 (1996).

Plaintiff was not similarly situated to the group of potential taxpayers that received defendant's notice. Plaintiff had a pending matter before defendant, had not relied on the application of PL 86-272 in its decision to conduct business in Michigan, believed that the *Gillette* decision could impact its pending matter before defendant, and had prior notice that defendant considered plaintiff liable for the single business tax in Michigan for years prior to 1989. In contrast, the class of potential taxpayers did not have pending matters before defendant, had not been previously audited by defendant, and were effectively without notice of their single business tax liability in Michigan until this Court issued its decision in *Gillette*.

Additionally, a rational basis exists for defendant's disparate treatment. As a threshold matter, we note that plaintiff has

mischaracterized defendant's action in this case toward the nonfiling potential taxpayers as an act of amnesty, which would be prohibited by MCL 205.28(1)(e); MSA 7.657(28)(1)(e). Defendant did not forgive this group for any unpaid single business tax assessments for tax years before 1989, but merely made a decision pursuant to its enforcement power as to how to allocate its resources to achieve the optimal level of compliance 205.13(h), MSA 7.657(13)(h). Considerations of due process, availability of records, the nonfilers' reliance on defendant's bulletins, and defendant's limited resources reasonably justify defendant's enforcement decision. Although plaintiff believes that it has been treated more harshly, disparate treatment is not invalid merely because it results in some inequity. *St Louis, supra at 73.*
Affirmed.

/s/ Gary K. McDonald
/s/ David H. Sawyer
/s/ Joel P. Hoekstra

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SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

January 24, 2000

Mr. Samuel John McKim III
Miller, Canfield, et al.
150 West Jefferson, Ste. 2500
Detroit, MI 48226

Re: Cosmair, Inc.
v. Michigan Department of the Treasury
No. 99-928

Dear Mr. McKim:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk

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MCLA 205.30c

205.30c. Voluntary disclosure agreements; criteria; persons eligible; relief available; definitions

Sec. 30c (1) Through December 31, 2003, the commissioner, or an authorized representative of the commissioner, on behalf of the department, may enter into a voluntary disclosure agreement with a person who makes application, who is a nonfiler, and who meets 1 or more of the following criteria:

(a) Has a filing responsibility under nexus standards issued by the department after December 31, 1997.

(b) Has a reasonable basis to contest liability, as determined by the commissioner, for a tax or fee administered under this act.

(2) All taxes and fees administered under this act are eligible for inclusion in a voluntary disclosure agreement.

(3) To be eligible for a voluntary disclosure agreement, subject to subsection (1), a person must meet all of the following requirements:

(a) Except as otherwise provided in this subdivision, has had no previous contact by the department or its agents regarding a tax covered by the agreement. For purposes of this subdivision, a letter of inquiry, whether a final letter or otherwise, requesting information under section 21(2)(a) that was sent to a nonfiler shall not be considered a previous contact under this subdivision if the nonfiler sends a written request to the department to enter into a voluntary disclosure agreement not later than June 30, 1999.

(b) Has had no notification of an impending audit by the department or its agents.

(c) Is not currently under audit by the department of treasury or under investigation by the department of state police, department of attorney general, or any local law enforcement agency regarding a tax covered by the agreement.

(d) Is not currently the subject of a civil action or a criminal prosecution involving any tax covered by the agreement.

(e) Has agreed to register, file returns, and pay all taxes due in accordance with all applicable laws of this state for all taxes administered under this act for all periods after the lookback period.

(f) Has agreed to pay all taxes due for each tax covered under the agreement for the lookback period, plus statutory interest as stated in section 23, within the period of time and in the manner specified in the agreement.

(g) Has agreed to file returns and worksheets for the lookback period as specified in the agreement.

(h) Has agreed not to file a protest or seek a refund of taxes paid to this state for the lookback period based on the issues disclosed in the agreement or based on the person's lack of nexus or contacts with this state.

(4) If a person satisifies all requirements stated in subsections (1) and (3), the department shall enter into a voluntary disclosure agreement with that person providing the following relief:

(a) Notwithstanding section 28(1)(e) of this act, the department shall not assess any tax, delinquency for a tax, penalty, or interest covered under the agreement for any period before the lookback period identified in the agreement.

(b) The department shall not assess any applicable discretionary or nondiscretionary penalties for the lookback period.

(c) The department shall provide complete confidentiality of the agreement and shall also enter into an agreement not to disclose, in accordance with section 28(1)(f), any of the terms or conditions of the agreement to any tax authorities of any state or governmental authority or to any person except as required by exchange of information agreements authorized under section 28(1)(f), including the international fuel tax agreement under chapter 317 of title 49 of the the United States Code, 49 U.S.C. 31701 to 31708. The department shall not exchange information obtained under this

section with other states regarding the person unless information regarding the person is specifically requested by another state.

(5) The department shall not bring a criminal action against a person for failure to report or to remit any tax covered by the agreement before or during the lookback period if the facts established by the department are not materially different from the facts disclosed by the person to the department.

(6) A voluntary disclosure agreement is effective when signed by the person subject to the agreement, or his, her, or its lawful representative, and returned to the department within the time period specified in the agreement. The department shall only provide the relief specified in the executed agreement. Any verbal or written communication by the department before the effective date of the agreement shall not afford any penalty waiver, limited lookback period, or other benefit otherwise available under this section.

(7) A material misrepresentation of the fact by an applicant relating to the applicant's current activity in this state renders an agreement null and void and of no effect. A change in the activities or operations of a person after the effective date of the agreement is not a material misrepresentation of fact and shall not affect the agreement's validity.

(8) The department may audit any of the taxes covered by the agreement within the lookback period or in any prior period if, in the department's opinion, an audit of a prior period is necessary to determine the person's tax liability for the tax periods within the lookback period or to determine another person's tax liability.

(9) Nothing in this section shall be interpreted to allow or permit unjust enrichment as that term is defined in subsection (11). Any tax collected or withheld from another person by an applicant shall be remitted to the department without respect to whether it was collected during or before the lookback period.

(10) The department shall not require a person who enters into a voluntary disclosure agreement to make any filings that are additional to those otherwise required by law.

(11) As used in this section:

(a) "Lookback period" means 1 or more of the following:

(i) The most recent 48-month period as determined by the department or the first date the person subject to an agreement under this section began doing business in the state if less than 48 months.

(ii) For single business taxes levied under the single business tax act, 1975 PA 228, MCL 208.1 to 208.145, the lookback period shall be the 4 most recent completed fiscal or calendar years over a 48-month period or the first date the person subject to an agreement under this section began doing business in this state if less than 48 months.

(iii) Notwithstanding subparagraphs (i), (ii), and (iv), the most recent 36-month period as determined by the department or the first date the person subject to an agreement under this section began doing business in this state if less than 36 months, if tax returns filed in another state for a tax based on net income that included sales in the numerator of the apportionment formula that now must be included in the numerator of the apportionment formula under the single business tax act, 1975 PA 228, MCL 208.1 to 208.145, and those sales increased the net tax liability payable to that state.

(iv) If there is doubt as to liability for the tax during the lookback period, another period as determined by the commissioner to be in the best interest of this state and to preserve equitable and fair administration of taxes.

(b) "Nonfiler" for a particular tax is a person that has never filed a return for the particular tax being disclosed.

(c) "Person" means an individual, firm, bank, financial institution, limited partnership, copartnership, partnership, joint venture, association, corporation, limited liability company, limited liability partnership, receiver, estate, trust, or any other group or combination acting as a unit.

(d) "Previous contact" means any notification of an impending audit pursuant to section 21(1), review, notice of intent to assess, or

assessment. Previous contact also includes final letters of inquiry pursuant to section 21(2)(a) or a subpoena from the department.

(e) "Unjust enrichment" includes the withholding of income tax under the income tax act of 1967, 1967 PA 281, MCL 206.1 to 206.532, and the collection of any other tax administered by this act that has not been remitted to the department.

(f) "Voluntary disclosure agreement" or "agreement" means a written agreement that complies with this act.

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STATE OF MICHIGAN
IN THE SUPREME COURT

SYNTEX LABORATORIES,

Petitioner-Appellant, Supreme Court No. 115012

v Court of Appeals No. 196546
Michigan Tax Tribunal No. 97852

REVENUE DIVISION OF THE DEPARTMENT
OF TREASURY OF THE STATE OF MICHIGAN,

Respondent-Appellee.
_____/

RESPONDENT-APPELLEE'S ANSWER IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL

Respectfully submitted,

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Dated: November 18, 1999

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(2) Non-filers' reliance upon the Department's bulletins. As noted above, the Department changed its initial position in 1980, when it determined that PL 86-272 stated the applicable nexus standard. While the Department continues to believe that an ultimate opposite conclusion was foreseeable, it recognized that taxpayers may have relied on the 1980 bulletin in structuring their business operations.

(3) The absence of records. Although taxpayers are required to maintain records which are necessary for the proper determination of their tax liability, MCL 205.28(3); MSA 7.657(28)(3), initially the burden is upon the Department to demonstrate nexus for taxation. While it may be reasonable to expect taxpayers to maintain records for at least 4 years,[1] the Department believed that it would not be reasonable to maintain

records for 17 years, i.e., beginning when the SBT was enacted. Without records it would be difficult and expensive for the Department to prove that a potential taxpayer had nexus in Michigan.

(4) The Department's limited resources. The Department was faced with the decision how best to allocate its limited resources in achieving maximum compliance with *Gillette* and *Guardian*. The Department does not have the resources to audit all taxpayers.

The Department of Treasury submits that it chose the most equitable and efficient method of applying *Gillette* and *Guardian* from among three different types of approach [sic], each of which would have been legal and reasonable. **First, the Department could have actively attempted to obtain compliance by all taxpayers with *Gillette* for tax years beginning in or after 1993 (the year *Gillette* and *Guardian* were decided). This would have**

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[1] Under the Internal Revenue Code records must be retained so long as they may be material in the administration of the Internal Revenue laws (IRS Reg § 1.601-1(1)). The Internal Revenue Service published its Guide to Retention Requirements on January 1, 1994 which suggests that records for income, deductions and credits, should be kept until the statute of limitations for the return expires. The general statute of limitations for assessing a deficiency under the IRC is three years.

been a viable alternative. (Emphasis added.) See *MCI v Treasury Dept*, 136 Mich App 28, 38; 355 NW2d 627 (1984). **(Department of Treasury could adopt postdecision policies of either taxing or not taxing two similarly situated taxpayers).** (Emphasis added.)

A second option would have been for the state to take appropriate action, i.e., to conduct audits or issue assessments, when the Department became aware of a nonfiling potential taxpayer. The legitimacy of such a policy was recognized recently in *Chrysler Rail Transportation Corp v Holt*, 845 F Supp 463 (1994) in which the U.S. District Court Judge stated:

> The primary purpose of Section 306 was to insure railroads were not taxed in a discriminatory manner when compared with all other commercial and industrial property. The plaintiff's complaint, however, is not that railroads are being discriminated against when compared to other businesses. Rather plaintiffs complain that other railroads who may be subject to this tax have not been discovered or have been discovered and have not been taxed. While it may be that the State has not acted with due diligence in ascertaining ownership of interstate railcars, the State has not acted improperly. *The State has chosen not to spend the time and money to actively seek out ownership information concerning all interstate railcars but instead has applied the tax if and when relevant ownership information becomes available and only if the amount of tax collectible makes collection worthwhile. While this method of*

> *enforcing the tax codes may be inefficient, it is not illegal.*
>
> I am satisfied that the state tax is not discriminatory and does not violate Section 306 of the 4R Act. The tax does not defy the purpose of Section 306. *The simple fact that the plaintiffs in this case have been found subject to the tax, while others who may be subject have not yet been discovered, does not make this tax discriminatory.*

Chrysler Rail, 845 F Supp, at 468 (emphasis added).

The Department chose a third option designed to achieve maximum compliance with an efficient allocation of scarce administrative resources. Thus, the Department decided actively to attempt to locate and to obtain compliance of unknown, nonfiling potential SBT taxpayers with *Gillette* for the four calendar years which preceded the decision.

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